IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 10-0097

LARRY DIMARZIO,

Appellant,

vs

CRAZY MOUNTAIN CONSTRUCTION, INC. a Montana corporation, F.L. DYE COMPANY, a Montana corporation, BRIDGER GLASS & WINDOWS, INC, a Montana corporation,

Appellees.

APPELLANT LARRY DIMARZIO'S COMBINED REPLY BRIEF AND ANSWER TO CROSS APPEALS

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County

John M. Kauffman
Kasting, Kauffman & Mersen, P.C.
716 S. 20th Ave. Suite 101
Bozeman, MT 59715
(406) 586-4383
jkauffman@kkmlaw.net
Attorneys for Appellant
Larry DiMarzio

William A. D'Alton
D'Alton Law Firm, P.C.
P.O. Drawer 702
Billings, MT 59103-0702
(406) 245-6643
bdalton@aol.com
Attorney for Crazy Mountain
Construction, Inc.

Edward Guza
Guza, Williams & Nesbitt
25 Apex Dr. Suite B
Bozeman, MT 59718
(406) 5862222
eguza@gwnlaw.com
Attorneys for F.L. Dye Company

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Appellant Larry DiMarzio ("DiMarzio") hereby files his Reply in support of his appeal and Answers the cross appeals filed by Crazy Mountain Construction, Inc. ("CMC") and F.L. Dye Company ("Dye") pursuant to Rule 12(4) M.R.App.P. DiMarzio first sets forth its Reply to CMC and Dye in Section I, II and III below, then provides his Answer to CMC's and Dye's cross appeal in Section IV.

I. CMC's ERRORS IN REPRESENTING THE RECORD

The parties agree that the case arises out of a remodeling project on DiMarzio's home in Bozeman, Montana. DiMarzio hired CMC as the general contractor on the project. CMC and DiMarzio entered into a Cost Plus Contract dated May 14, 2003 related to the work (the "CMC Contract"). CMC hired Dye to do the air conditioning and humidification work on the DiMarzio remodel. Dye was CMC's subcontractor. *See Pretrial Order, at Agreed Fact 4 (Case Register Report "CR" 111).* DiMarzio filed suit because of defects in the work performed by both CMC and Dye.

In its Answer, CMC states the CMC Contract "did not have any terms regarding the air control systems" installed by Dye. *See CMC Answer at 2.* In addition, CMC states that it "refused to pressure F.L. Dye as CMC did not believe problems existed with the air control systems." *Id.* These statements are either misleading or false. While it is true the **initial** CMC Contract did not have

terms for the air control systems, it was undisputed that the CMC Contract was modified to add Dye's work, and undisputed that CMC recognized the problems with Dye's work early on.

(i) All of the parties and the district court agreed that CMC hired Dye as a subcontractor for the DiMarzio project. *Trial Transcript ("TR") Day 1 at 206, 215; Pretrial Order at Agreed Fact 4, (CR 111) and District Court Order (CR 209) attached as DiMarzio's Appendix ("DiMarzio App.") 2 at page 14.*

(ii) Dye admits that the only contract it had on the project was with CMC. *See Dye Answer at 15 and 17.*

(iii) CMC recognized that its contract with DiMarzio was modified to add the work to be completed by Dye, including the air conditioning and humidification. *See TR Day 1 at 257* and Deposition of Butch Keyes at 163-164. ("Q. You completed everything you were hired to do? A. We built an atrium and we put heating **and air conditioning** in." *(Emphasis added)*)

(iv) CMC wrote to Dye complaining, in part, that "[s]ince the beginning of installation, the installation has been plagued with problems." *DiMarzio App. 9.* While DiMarzio helped with the letter (*TR Day 2 at 299-300),* CMC confirmed the accuracy of this statement at trial. *TR Day 2 at 19, 27-28.*

In its Answer, CMC also states: "Eventually, DiMarzio told CMC that he would no longer pay CMC until it did something about F.L.Dye's work. In addition, DiMarzio made unreasonable demands upon CMC. With DiMarzio's decision to stop payment to CMC, CMC stopped work." *CMC Answer at 2.* These allegations misrepresent the record.

CMC quit on April 30, 2004. *TR Day 1 at 233.*

Q: ....But you quit before it was fixed, correct?"
A: The answer is 'Yes, we would have. Yes, before there was a remedy for it.' *(TR Day 1 at 212)*

....

A: We quit work there, yes. *(Id. at 213)*

...

Q. No, you quit the job, walked off the job on April 30th, did you not? We can go back to your deposition testimony.
A. Yes.
Q. Okay. So you quit before he ever got a final bill, correct?
A. Correct. (*Id. at 233*)

Before CMC quit, DiMarzio had timely paid every bill sent to him by CMC. *Id. at 232.* CMC quit before CMC finished its work and before it ever sent him a final bill. There is no evidence that DiMarzio refused to pay CMC before it quit. CMC quit without any warning to DiMarzio. *TR Day 2 at 299.* Though CMC claimed it would come back to take care of unfinished work, it had "no intention of going back. *c.f TR Day 2 at 137 with TR Day 1 at 256* (Both testimony of CMC's Butch Keyes).

CMC leads this Court to believe that DiMarzio only complained about Dye's work "[a]fter the relationship ended" between it and DiMarzio. *CMC Answer at 2.* CMC knows this is not accurate. CMC quit on April 30, 2004. *TR Day 1 at 233.* CMC's own Answer notes that "problems over the air control systems started to arise in March of 2004." *Answer at 8.* Moreover, CMC's letter to Dye in May of 2004 (*DiMarzio App. 9)*, states, in part, "[s]ince the beginning

the installation has been plagued with problems". *TR Day 2 at 19, 27-28* (CMC verified the accuracy of the statements its May 2004 letter).

CMC alleges its first draft of the May 2004 letter criticizing Dye was rewritten by DiMarzio, with DiMarzio's input being "the comments critical of F.L.Dye's work." *Answer at 8.* The record does not support this allegation and the transcript passages CMC cites do not mention it. Rather, the record reflects that CMC's first draft of the letter was critical of Dye's work. It was introduced as *Ex. 41* and states, in part, "[h]e is also aware of the substandard delays during installation, lack of equipment operating properly or not operating at all." *See also TR Day 2 at 20.*

CMC claims it "offered to come back to the job" after leaving the job at the end of April and that DiMarzio told him not to. *Answer at 10.* While Butch Keyes of CMC did make that statement at trial, the gesture was merely cosmetic as he testified CMC "had no intention of going back." *TR Day 1 at 256.*

With respect to the leaky atrium, CMC claims that "[o]ut of all the parties and witnesses who testified at trial, only Mr. and Mrs. DiMarzio testified seeing leaks in the atrium." This is simply false. Witnesses Russell Olsen and Paul Grassechi also testified to seeing multiple leaks. For example:

> Q. Did you see any other evidence of leaking in the atrium?
> A. Yeah, you could see where storefront system had leaked in a couple spots, you know, and it actually was leaking at the time we were there in the rain.

TR Day 2 at 184; see also id at 195. (Testimony of Olsen and testimony noting the difference between a leak and condensation).

> Q. All right. Did you ever see any other leaks in the atrium?
> A. I did. I remember on the lower walls over the stone, I remember there were probably at least places [sic], different places.
> Q. Okay, okay. How about any other places that you remember?
> A. Over the door, the header, I don't know if I can refer to another picture.

TR Day 3 at 211 (Testimony of Grassechi).

While there are other inaccuracies in the CMC's Answer, the foregoing represent the errors that may influence the outcome of this appeal.

II. DYE'S ERRORS IN REPRESENTING THE RECORD

In several places in Dye's Answer, Dye states that it delivered two separate proposals to DiMarzio for its work and DiMarzio "indicated his acceptance" of Dye's proposals by his signature as "customer". *See Dye's Answer at 1 and 3.* Dye goes on to argue that Dye and DiMarzio created "a valid express and/or implied contract." *See id at 5.* Dye misleads this Court.

1. All parties agreed at trial and under oath that it was CMC that hired Dye as its subcontractor. *TR Day 1 at 206, 215 and 223* (CMC's testimony); *TR Day 2 at 239-240* (Dimarzio's testimony); *TR Day 3 269-270* (Dye's testimony) and the Pretrial Order. *CR 111 at Agreed Fact 4.* The district court even noted that "All parties agreed that the contract for Dye's services were between Crazy Mountain Construction and Dye and not with DiMarzio." *District Court Order, (CR 209), DiMarzio App. 2 at page 14.*

2. All of Dye's proposals were addressed to CMC and all of its bills were addressed to CMC and all of its correspondence was directed to CMC. *See App 6 and 7* (Dye proposals, correspondence and bills).

3. DiMarzio's signatures on the documents referenced by Dye (Dye's Appendix 1) were not intended to, and did not, indicate acceptance by Dimarzio, but rather an acknowledgment that DiMarzio had seen the type of equipment that would be used. CMC's Butch Keyes testified specifically on this issue. *TR Day 1 at 215 and 223.* It was never CMC's intent for DiMarzio to hire Dye, nor was it DiMarzio's. *Id.*

III. DIMARZIO'S REPLY TO CMC'S AND DYE'S ARGUMENTS

DiMarzio presented four issues on appeal. CMC's Answer discusses only Issues 2, 3 and 4. Dye's Answer discusses only Issues No. 1, 2 and 3.

A. Appellate Issue No. 1

In his first issue, DiMarzio contends the district court abused its discretion when it precluded DiMarzio's air conditioning expert, William Lynch, P.E. ("Lynch"), from testifying in his case in chief.

Dye argues Lynch was properly excluded because he was untimely disclosed. *Dye Answer at 8-10.* As reflected in DiMarzio's Opening Brief, DiMarzio disclosed Lynch more than two years before trial in this matter - before mediation, before the pretrial conference and before a trial date had been set.. *See Opening Brief at 15-16.* Moreover, DiMarzio's initial expert, Kevin Amende ("Amende") stated under oath that he would not testify at trial because a conflict

had developed between him and DiMarzio. *CR 96, Affidavit at ¶ 4 and 5, DiMarzio App. 13.*

Dye faults DiMarzio for not further explaining to the district court the "unsubstantiated conflict" that required "the complete replacement of Amende". *Dye Answer at 9.* Dye misapprehends the contents and nature of the affidavit. The affidavit itself provides the substantiation for the request. Amende stated under oath that he "would not testify on behalf of Mr. Dimarzio at the trial." *Id. at ¶5.* Amende went on to state that neither DiMarzio nor his counsel asked him not to testify, but rather the decision was solely his own. *Id. at ¶6.* What additional reason would Dye propose need be given? Amende's decision is why DiMarzio needed a "complete replacement". Lynch was Amende's replacement. He was also identified to provide opinions on new information provided by Dye's Ron Schaeffer in his deposition taken after the expert disclosure deadline. *See Opening Brief at 15* and *CR 90* cited therein.

To the extent Dye did not believe Amende, there was nothing that prevented Dye from calling him on the telephone and asking him; or going to meet with him; or deposing him. There was ample time for Dye to discover anything it wanted about Amende, or Lynch, had it found Lynch's expert disclosure inadequate.

Dye cites several cases for the proposition that this Court has "precluded experts in situations in less egregious cases ....." *Dye Answer at 10.* The cases cited, however, precluded expert witnesses from testifying because their disclosures had not met the requirements of Rule 26(b)(4) M.R.Civ.P.,

Dye first relies on *Sunburst School Dist. No. 2 v. Texaco, Inc.* 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, but in that case the defendant failed to specify the facts and opinions upon which the expert would testify and unsuccessful argued that the plaintiff was obligated to send interrogatories to discover an expert's position. *Id., ¶¶20, 22, and 69.* Similarly, the experts in Dye's next two cases were excluded because their disclosures failed to satisfy Rule 26(b)(4) M.R.Civ.P. *Nelson v. Nelson*, 2005 MT 263, ¶¶ 28-34, 329 Mont. 85, 122 P.3d 1196 ("We agree with Robert that the conclusory statement in the disclosure document ... does not satisfy the requirements of Rule 26."); and *Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶20, 296 Mont. 197, 988 P.2d 1230, ("Seal did not state the substance of the facts and opinions to which Dr. Cocozzo would testify or a summary of the grounds for Dr. Cocozzo's opinion").

The basis for excluding the experts in the foregoing cases does not exist in the case at bar. Lynch's expert disclosure meets all of the requirements of Rule 26(b)(4) M.R.Civ.P. and no one has claimed otherwise. *See Lynch Disclosure, DiMarzio App. 11.*

Dye also cites *First Citizens Bank v. Sullivan,* 2008 MT 428, 247 Mont. 452, 200 P.3d 39. In that case, the bank did not disclose a witness as an expert in response to an interrogatory, in response to a scheduling order, or in the pretrial order. *Id., ¶27.* As a result, the district court prevented the witness from testifying as an expert. This Court affirmed, noting "the Bank did not disclose Orizotti as an expert witness despite three requests to do so." *Id., ¶¶27, 29 and 31.*

In the present case, DiMarzio did not neglect to disclose Lynch, as the bank did in *First Citizens,* and, as is clear from the record Dye had ample time to discover anything else it wanted to know about Lynch that was not included in the disclosure. There simply was no surprise, nor any intent to surprise Dye with the Lynch disclosure. Amende stated he would not testify for DiMarzio at trial. The disclosure was more than two years before trial. DiMarzio respectfully submits that the district court abused its discretion when it precluded DiMarzio from calling Lynch in his case in chief and having him testify on all matters disclosed.

B. Appellate Issue No. 2

In his second issue, DiMarzio contends the district court erred "as a matter of law, when it allowed the jury to decide if a contract existed between DiMarzio and Dye." *Opening Brief at 19.* DiMarzio went on to add that it erred when it gave Instruction No. 22 on implied contracts. *Id.* Both CMC and Dye oppose DiMarzio on the second issue.

All parties who testified on the issue agreed that Dye's contractual relationship was with CMC, as opposed to with DiMarzio. *See TR Day 1 at 206, 215 and 223*; *TR Day 2 at 239-240*; *TR Day 3 269-270.* Even in its Answer, Dye concedes its testimony was that "their contract was only with CMC..." *Dye Answer at 15 and 17.* The district court noted that, "[a]ll parties agreed that the contract for Dye's services were between [CMC] and Dye and not with DiMarzio" *DiMarzio App. 2 at 14 (CR 109)*. It is difficult to image what more undisputed evidence could have been provided on this issue.

Despite the testimony of the parties, CMC argues that the question of whether the contract between existed Dye and DiMarzio was properly submitted to the jury. It begins by citing to a colloquy between counsel for DiMarzio and the district court regarding DiMarzio's motion for a directed verdict on Dye's breach of contract claim. *CMC Answer at 19-22.* The passage cited does not support CMC's opposition, but simply demonstrates that DiMarzio preserved the issue for appeal.

CMC next cites the discussion between counsel and the Court when settling instructions and claims DiMarzio's counsel agreed that an implied contract theory was valid. *Id. at 22.* In the passage cited, counsel for DiMarzio agreed one could plead both contract and tort theories. Counsel did not agree that the

instruction was proper or that, after the close of evidence, Dye could proceed on its breach of contract theory.

CMC also argues that "no express contract existed between CMC and DiMarzio regarding the design and installation of the air control systems." *Id.* Therefore, CMC posits, the contract must be between Dye and DiMarzio. For support, it discusses the direct contact DiMarzio had with Dye, as if to suggest that communications alone could create a contract. Dye makes a similar argument in its Answer. Not only is the logic flawed, but CMC and Dye ignore and fail to address the undisputed evidence to the contrary.

CMC and Dye do not mention that (i) everyone agreed CMC hired Dye; (ii) all of Dye's correspondence on the project was sent to CMC; (iii) Dye billed CMC; and (iv) CMC paid Dye. *See discussion and citations above.*

DiMarzio's direct contact with Dye demonstrates nothing more than what one would expect on most residential construction projects - owners talk to subcontractors and have a say in what their home looks like. Nothing in the CMC Contract prohibited DiMarzio from talking to CMC's subcontractors, and such prohibition would make little sense on a practical level. While it is true Dye sent a copy of its air conditioning plans to DiMarzio, Dye also sent them to CMC. The discussions alone do not create a contract. There must be identifiable parties,

mutual consent to all material terms and consideration. *See Kortum-Managhan v. Herbergers NBGL,* 2009 MT 79, ¶18, 349 Mont. 475, 204 P.3d 693.

In order for consent to be established under Montana law, there must be "mutual assent" or a "meeting of the minds" on all essential terms of the contract, and there must be a valid offer and acceptance in order to effectuate a contract. *See id* (quoting *Keesun Partners v. Ferdig Oil Co., Inc.*, 249 Mont. 331, 337, 816 P.2d 417, 421 (1991)). To hold otherwise would create an environment where people could accidently enter into a contract and inadvertently undermine or vitiate the owner-general contractor / general contractor-subcontractor relationships. That was neither the intent nor the reality in this case.

Even if consent were not required,[1] there must be identifiable parties. As to the contract for Dye's services, Dye and CMC were the identifiable parties. Moreover, the consideration flowed between CMC and Dye. Dye did the work at CMC's request, billed CMC and CMC paid Dye. These facts are consistent with the testimony as well as the how the relationship generally works as between

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[1] In *CB & F Development Corp. v. Culbertson State Bank*, 256 Mont. 1, 6 844 P.2d 85, 88 (1992) this Court held that consent was an essential element to finding an implied contract, but in *In re Marriage of Rock*, 257 Mont. 476, 479, 850 P.2d 296, 298 (1983) this Court held that "lack of consent is irrelevant to an implied contract." Section 28-2-103, MCA notes that the terms of express contracts are in words and the terms of implied contracts are reflected by conduct. The statute, however, does not eliminate the "consent" requirement, but merely speaks to how the consent is demonstrated. It is difficult to square these two opinions but the Court need not reach this issue as the identifiable parties and consideration issues do not exist as between Dye and DiMarzio, but do exist as between Dye and CMC. Moreover, the "conduct" demonstrates that the contractual relationship was between CMC and Dye.

general (CMC) and sub (Dye) contractors. CMC also charged DiMarzio a 12% fee on top of Dye's bills for coordinating Dye and "making sure [its] work was done in a workmanlike manner". *TR Day 1 at 207-08 and 216 and Day 2 at 30.* CMC believed Dye owed it a duty to install its work properly. *TR Day 2 at 8.* Finally, the record shows that CMC modified its agreement with DiMarzio to add Dye's work. *See TR Day at 257* and *Deposition of Butch Keyes at 163-164.*

In its Answer, Dye argues that it made an offer to DiMarzio which he accepted and therefore created a contract. *See Dye Answer at 16.* The record does not support that fact. Though DiMarzio signed documents prepared by Dye and sent to CMC, it was neither his intent, nor CMC's intent, nor Dye's intent that the signing evidence an agreement between DiMarzio and Dye. This was expressly explained by CMC during the first day of trial.

Q. ...And maybe a couple of the other ones have also his signature on it. But you didn't expect him to hire F.L. Dye, correct?
A. No, we did not.
Q. In fact you -- he just signed those to acknowledge that that was the kind of equipment that he wanted, right?
A. That is correct. Those were given to him so that -- and my son Ryan took them to him and he read through them with him, and so Larry understood what the equipment was he was going to get.
Q. Right. But you actually hired F.L. Dye, correct?
A. Crazy Mountain did.

See TR Day 1 at 214-215.

Finally, Dye admits that the **only** contract it had was with CMC. *Dye Answer at 15 and 17.* Dye contends that just because its representative testified to this fact at trial, it was not dispositive, but rather only went to the "weight of the evidence." *Dye Answer at 18.* DiMarzio respectfully disagrees and submits that such a statement, under oath, during trial, with the aid of counsel, coupled with the testimony of all the other parties should have ended the inquiry. The issue should have never reached the jury.

Based upon the foregoing and the arguments in DiMarzio's Opening Brief pages 19-24, the district court erred by allowing the jury to determine if a contract between DiMarzio and Dye existed.

B. Appellate Issue No. 3

DiMarzio's third issue on appeal is that the district court erred in giving Instruction No. 23, which stated:

> Performance by a contractor of a construction contract in accordance with the provisions of the contract entitles a contractor to payment from the owner. (*See DiMarzio App. 15)*

CMC first argues that DiMarzio did not timely object to the instruction. *Answer at 26.* CMC is mistaken. The district court ordered that all objections to jury instructions be filed "14 days before the date set for trial." *Order Vacating and Resetting Trial, CR 133 at 2.* DiMarzio timely filed his objection to, what became, Instruction No. 23 on August 11, 2009. *CR 149.* By the time the

instructions were given, the district court had considered the objections and, to the extent the instruction was given, rejected the objections. Counsel for DiMarzio noted its desire to preserve its rights using the district court's procedure while settling instructions and the district court recognized the same. *See TR Day 5 at 248-249.* DiMarzio timely preserved his objection to Instruction No. 23.

CMC agrees with DiMarzio that the language for Instruction No. 23 came from the Prompt Payment Act, but claims DiMarzio "gave no authority" for the proposition that the Act has a $400,000 jurisdiction limit. *Answer at 27.* That is not true. DiMarzio cited §28-2-2107, MCA, *Opening Brief at 26.* Neither CMC nor Dye address this issue.

With respect to the remaining portion of CMC's and Dye's arguments, DiMarzio refers the Court its Opening Brief at 24-26.

C. Appellate Issue No. 4

The final issue raised by DiMarzio is only addressed by CMC, not Dye. The final issue is whether the district court erred in giving Instruction No. 24. DiMarzio contends discussing the relationship between a general contractor and a subcontractor in the instruction not only was incorrect, but improperly commented on the evidence. CMC disagrees and represents to this Court that "Instruction No. 24 is actual pattern instruction No. 10.10. CMC is mistaken. That pattern instruction (MPI 2d 10.10) states:

> An **independent contractor** is a person who is hired to produce a specific result but who is not subject to the right of control of the **employer** as to the way he/she brings about that result.

MPI 2d 10.10 (*emphasis added*). The Instruction No. 24 given by the district court in this case substituted "subcontractor" for "independent contractor" and "general contractor" for "employer". It improperly and incorrectly converted an employment instruction into an instruction on the relationship between a general contractor and a subcontractor.

CMC also claims that DiMarzio's expert Russell Olsen testified that a subcontractor on his company's job guarantees his own work and then extrapolates that the standard for all subcontractors is that they guarantee their own work. *See CMC Answer at 29.* Putting aside the fact that the passage CMC cites is a discussion of a contract **not** at issue in this case, nothing in CMC's argument speaks to the responsibility that a general contractor has **to an owner** for poor supervision of the subcontractor or the subcontractor's failure to perform its work in a workman like manner. After all, CMC took on that responsibility when it charged DiMarzio a 12% fee on top of its subcontractors' bills. *TR Day 1 at 208.*

The remaining arguments by CMC are addressed on pages 27-30 of DiMarzio's Opening Brief and in the information provided above.

IV. ANSWER TO CROSS-APPEALS

CMC has cross appealed the district court's decision awarding it some, but not all of the award of attorney's fees it requested. Dye has cross appealed the district court's decision denying its request for prejudgment interest (*DiMarzio App. 2 at 13-14)*. DiMarzio respectfully submits that the district court's decisions on these issues were correct and should not be disturbed.

A. Statement of the Issues

1. CMC Issue on Cross-Appeal: Did the district court abuse its discretion when it awarded CMC some, but not all, of its attorney's fees and costs?

2. Dye Issue on Appeal: Did the district court err when it refused to award Dye prejudgment interest?

B. Statement of the Case and Statement of Facts

A statement of the case is set forth in DiMarzio's Opening Brief and incorporated herein by reference. A statement of the facts is set forth in DiMarzio's Opening Brief and incorporated herein by reference. Any additional facts to address the issues on cross-appeal are provided in the Argument sections.

C. Standard of Review

Whether a party is entitled to recover attorney fees is a question of law, and this Court reviews a district court's conclusions of law regarding attorney fees to determine whether those conclusions are correct. *Avanta Federal Credit Union v.*

Shupak, 2009 MT, 458, ¶ 22, 354 Mont. 372, 223 P.3d 863 citing *Chase v. Bearpaw Ranch Assn.*, 2006 MT 67, ¶ 14, 331 Mont. 421, 133 P.3d 190. However, the amount of attorney's fees awarded by a district court is reviewed on an abuse of discretion standard. *Zier v. Lewis*, 2009 MT 266, ¶14, 352 Mont. 76, 218 P.3d 465 citing *Chase*, ¶ 15. The district court awarded CMC some, but not all of its fees. Thus, CMC is challenging the district court's decision regarding the amount of fees awarded and, consequently, the proper standard of review is whether the district court abused its discretion.

Regarding Dye's issue on cross appeal, "[a] district court's award of prejudgment interest is a question of law; therefore, this Court determines whether the district court correctly applied the law." *James Talcott Const. v. P & D,* 2006 MT 188, ¶ 28, 333 Mont. 107, 141 P.3d 1200.

D. Summary of Argument and Argument

CMC has failed to provide this Court a transcript of the attorney's fee hearing. As a result, CMC's appeal should be dismissed. In addition, the district court did not abuse its discretion by awarding some, but not all of the fees and costs CMC requested, provided however, that if this Court grants DiMarzio a new trial then no attorneys fees should be awarded at this stage.

As to Dye's cross appeal, Dye is not entitled to an award of prejudgment interest because Dye did not make a timely or proper request for them and there was no certain amount due on a certain date.

E. CMC's Cross Appeal Should Be Dismissed for Failure to Provide a Transcript of the Attorney's Fee Hearing

CMC's cross claim challenges the district court's decision awarding CMC part, but not all of the attorney's fees and costs it requested.

An award of fees, like any other award, must be based on competent evidence. *First Security Bank of Bozeman v. Tholkes*, 169 Mont. 422, 429, 547 P.2d 1328, 1331 (1976). The reasonableness of attorney fees must be ascertained under the facts of each case. *Plath v. Schonrock*, 2003 MT 21,¶ 36, 314 Mont. 101, 64 P.3d 984.

The district court held a hearing on the reasonableness of the fees on December 17, 2009. *See CR 220.* CMC has not provided this Court a transcript of the December 17, 2009 hearing. DiMarzio had no reason to order the transcript from the December 17 hearing as it was not part of his appeal. CMC's issue involves more than questions of law. For example, at the December 17, 2009 hearing the Court heard testimony from CMC's own witness as to why bills that reflected discussions with CMC's insurance carrier should be excluded from the award. The parties stipulated to some facts, but not others. The parties also

argued the issue. All of these factors helped to inform the district court, which resulted in awarding some fees, but not others.

CMC's cross appeal should be dismissed for its failure to provide this Court with a transcript of the hearing from which the district court based its decision.

> Montana Rules of Appellate Procedure require parties to provide a record sufficient to enable the Court to rule upon the issues raised. M.R.App. P. 8. In the absence of the transcript in the record, we cannot review this issue. For that reason, we affirm the District Court's holding regarding the awarding of attorney fees.

In re Marriage of Cameron, 2009 MT 302, ¶19, 352 Mont. 375, 217 P.3d 78; *see Yetter v. Kennedy*, 175 Mont. 1, 571 P.2d 1152 (1977) and *Rule 8(2) M.R.App.P.*

F. The District Court Did Not Abuse its Discretion in its Award of Fees and Costs

This Court applies an "abuse of discretion" standard when reviewing a district court's award of attorney's fees. *See Zier* and *Chase supra.* CMC, however, contends the proper standard of review is whether the district court's legal conclusions were correct.

The standard advanced by CMC, however, only applies as to "whether" a party is entitled to fees, not the "amount" of fees to be awarded under the circumstances. *See Avanta Federal Credit Union, Chase* and *Zier, supra.* The district court answered the "whether" question in favor of CMC in its October 26, 2009 Order, which CMC is not appealing. *DiMarzio App. 2 at 2-7(CR 209).* This will become moot if DiMarzio's request for a remand based upon his appeal

is granted. In any event, CMC's issue on cross appeal is with the amount the district court determined to award CMC in its Findings of Fact, Conclusions of Law and Order re: Attorney's Fees ("Fee Order"). *See Fee Order, DiMarzio App. 3 at 1* ("On December 17, 2009, the Court held a hearing to determine the amount of attorney's fees..."). The appropriate standard of review issue on appeal is abuse of discretion.

When reviewing for an abuse of discretion, this Court considers "whether the trial court in the exercise of its discretion acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice." *West v. Club at Spanish Peaks,* 2008 MT 183, ¶44, 343 Mont. 434, 186 P.3d 1228.

In reaching its decision on the reasonableness of the fees, the district court took into account the seven factors set forth in *Plath, supra.* and noted that *Plath* allowed the district court to consider other factors. *Fee Order, DiMarzio App. at 10, CL #3.* At the hearing, it was clear that CMC had not paid the vast majority of the fees it was requesting, but rather Farmers Insurance paid the fees.[2] Moreover, the district court noted that DiMarzio successfully proved CMC was

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[2] CMC submitted its attorney's fees bills with "client" name and address redacted from most. At the hearing, counsel for CMC conceded that the bills with the name and address redacted had Farmers Insurance as the client, as opposed to CMC. *See DiMarzio App. 3 at 3, FF #2*

negligent and that the jury had awarded him damages for CMC's negligence. *See Special Verdict (DiMarzio App. 1)* and *Fee Order, DiMarzio App. 3, at 15.* Based upon the testimony at the hearing, the district court also determined it was reasonable to award only part of the fees charged by CMC's first attorney, Neil Westesen. *Fee Order, DiMarzio App. 3 at CL # 4 and 5.* Because CMC has not provided this Court with a transcript, this Court cannot review the reasonableness of the district court's decisions. Rather, it must rely upon the district court's conclusion. *See In re Marriage of Cameron, ¶19.*

CMC also challenges the district court's equitable grounds for its *Fee Order. CMC Answer at 36.* CMC raises no new arguments that are not adequately raised and disposed of in the *Fee Order*, which DiMarzio incorporated herein by reference.

DiMarzio respectfully submits that the rationale in the *Fee Order* adequately demonstrates the district court did not act arbitrarily, but rather employed conscientious judgment in view of all the circumstances and correctly applied the law. This Court should not reverse the district court's decision, as requested by CMC.

G. Dye is Not Entitled to an Award of Prejudgment Interest

Dye cross appeals the district court's decision denying its request for prejudgment interest. *See Decision and Order re: Attorney's Fees and Costs,*

("Cost Order") *DiMarzio App. 2.* The district court recognized that while prejudgment may be recovered pursuant to §27-1-211, MCA, a party must satisfy the following three prerequisites to recover under the statute:

> (1) the existence of an underlying monetary obligation; (2) the amount of recovery is certain or capable of being made certain by calculation, and (3) the right to recover the obligation vests on a particular day.

Cost Order, DiMarzio App. 2 at 13 citing *James Talcott,* ¶40. "Prejudgment interest is inappropriate, however, when the amount of a party's damages is uncertain or disputed." *Montana Petroleum Tank Release Compensation Bd. v. Crumley's, Inc.*, 2008 MT 2, ¶99, 341 Mont. 33, 174 P.3d 948.

Dye did not claim a right to prejudgment interest in its contentions, its issue of fact or its issues of law in the Pretrial Order. *See CR 111 at 16-17 and 33-37.* Dye never requested an award of prejudgment interest from the jury. Dye made its first request for prejudgment interest on September 8, 2009, seven days after the jury returned its verdict. *See* Dye's Memorandum in Support of Costs and Pre-Judgment Interest dated September 8, 2009. *CR 197.* It requested prejudgment interest with its bill of costs under §25-10-201, MCA.

The request for prejudgment interest was not timely nor is it an allowable cost under §25-10-201, MCA. The request was also untimely under §25-10-501, MCA because it was not made within 5 days of the verdict. That failure divested

the district court of jurisdiction to even consider the request. *See Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶ 66-68, 293 Mont. 97, 973 P.2d 818.

Even if the request were proper and timely made, Dye is not entitled to prejudgment interest because no one, not even Dye, knew the amount owed until the jury rendered its verdict. Dye's claim for damages in the Pretrial Order differs from what the jury awarded. *c.f. CR 111 at 17, Contention #9 and at 36, Issue of Law 17* with *Verdict, DiMarzio App. 1.* As a result, the district court held Dye could not meet the third prerequisite, though it could not meet the second either. *See Cost Order, DiMarzio App. 2 at 14.* Now that the amount has been reduced to a judgment, Dye's award has been accruing interest pending this appeal at the statutory rate of 10% per annum.

Dye cites that portion of *Swank Enterprises, Inc. v. All Purpose Services, Ltd.* 2007 MT 57, 336 Mont. 197, 154 P.3d 52 that states "[t]he fact that a claim is disputed does not make it uncertain," as long as the damage amount is reduced to certainty on a particular day." *Id., ¶39.* In *Swank*, the opposing parties were, in essence, two insurance carriers disputing coverage in a declaratory judgment action. One had paid a specific settlement amount on specific dates and contended the other carrier was responsible for that specific sum certain. *Id, ¶¶ 10-11.* The other carrier contested its liability for having to pay the amount. *See id., ¶38.* However, as noted by this Court, the amount was made certain once the final

settlement payment was made, long before trial. That is not the case before this Court.

Dye did not know the "amount certain" until the jury rendered its verdict. While Dye had invoices, they were sent to CMC, not DiMarzio and they were not the amount Dye requested in its counterclaim or in the Pretrial Order. There was no agreement, oral or written, between Dye and DiMarzio as to when any of Dye's bills to CMC would be paid and Dye presented no evidence of such an agreement. Not only did DiMarzio contest liability, the amount was uncertain and the date was uncertain.

Dye also cites *Ramsey v. Yellowstone Neurosurgical Associations, P.C.*, 2005 MT 317, 320 Mont. 489, 125 P.3d 1091 and states that it held prejudgment interest was proper under an implied or oral contract theory. *Dye Answer at 26.* The *Ramsey* case makes no reference to implied contracts, which was the theory ultimately upon which Dye based its case. The *Ramsey* case centered on an oral contract. While the district court awarded an amount different than that requested by the plaintiff in her pleadings, this Court noted that the reason "stems from the fact that only [the defendant] possessed the billing records necessary to calculate damages accurately." *Ramsey*, ¶21. In this case, Dye had all of the records all of the time.

For the reasons set forth above, and in the district court's *Cost Order*, Dye is not entitled to prejudgment interest. Dye is also not entitled to prejudgment interest should this Court grant the relief requested by DiMarzio in his appeal - remand for a new trial. In sum, the district court's decision on prejudgment should be affirmed.

V. CONCLUSION

DiMarzio respectfully requests that this Court reverse and remand this matter for a new trial based on one or more of the issues he has raised in his appeal. In addition, he requests that the Court affirm those portions of the district court's decisions challenged by CMC and Dye in their cross appeals.

DATED this 16th day of August, 2010.

KASTING, KAUFFMAN & MERSEN, P.C.

JOHN M. KAUFFMAN, counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; the word count calculated by WordPerfect is 6,379, excluding the certificates; and the brief does not average more than 280 words per page.

DATED this 16 day of August, 2010

KASTING, KAUFFMAN & MERSEN, P.C.

JOHN M. KAUFFMAN

CERTIFICATE OF MAILING

The undersigned hereby certified that on August 16th, 2010, a true and correct copy of the Reply and Answer Brief of Appellant Larry DiMarzio, was mailed, by U.S. Mail, postage prepaid, to the following counsel of record:

William A. D'Alton
D'Alton Law Firm, P.C.
P.O. Drawer 702
Billings, MT 59103-0702

Edward Guza
Guza, Williams & Nesbitt
25 Apex Dr. Suite B
Bozeman, MT 59718

By: